Understanding the Strong Basis in Evidence Standard in Ricci vs. DeStefano

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Introduction

"The way to stop discrimination on the basis of race," Chief Justice John Roberts recently wrote, "is to stop discriminating on the basis on race." Roberts advances the color-blind view that equal treatment can only be achieved when all racial preferences are eliminated. It directly contrasts with Justice Harry Blackmun's race-conscious account from thirty years earlier, which argues that, "in order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently." Since the passage of the landmark 1964 Civil Rights Act, affirmative action efforts have centered on these two competing perspectives—one that advocates measures that discounts race entirely and the other that actively uses race an integral factor in promoting equality and diversity.

Over the past forty-five years, these two frameworks have collided numerous times. Efforts to increase equality and diversity have been repeatedly challenged in the fields of education, voting, public contracting, and employment. The judiciary has struggled over how to best approach the issue. For instance, the Supreme Court within the last decade has determined that a rigid, point-based university admissions policy classified as an unconstitutional quota system, yet a more holistic policy that allows race to be a significant factor was permissible under the Equal Protection Clause of the Fourteenth Amendment. The answers to dealing with affirmative action are far from clear-cut. However, if we want to live in a world where discrimination no longer exists, there must be policies in place that provide citizens with an equal opportunity including laws that protect minorities from taking employment tests that may be facially neutral but unintentionally discriminate against them. It is this subject where the most recent controversy between the race-

conscious and color-blind orders factions is focused. They each faced answering the difficult question: Under what circumstances, if any, can an employer's purpose to avoid liability for unintentional discrimination excuse what otherwise would be prohibited intentional discrimination?

In March 2004, the City of New Haven wrestled with this problem. The examinations that it had administered as promotional tests for the lieutenant and capital positions for the New Haven Fire Department had racially skewed results. Even though forty-two percent of the test takers were racial minorities, whites were expected to fill seventeen of the nineteen available positions based upon the exam scores. Nonwhites were historically underrepresented in the department despite the fact that they made up nearly sixty percent of the City's racial composition. If the City chose to certify the results of the exam, it risked the possibility of being held liable for unintentionally discriminating against nonwhites, a provision known as disparate impact that is enumerated in Title VII of the 1964 Civil Rights Act. On the other hand, if the City discarded the test results, it knew that it would likely face a lawsuit from the seventeen white firefighters and one Hispanic firefighter who performed well on the exam for intentionally discriminating against them on the basis of race, a different provision known as disparate treatment under Title VII. After months of debate, the City voted to throw out the results and was indeed sued for intentional discrimination.

The district court granted summary judgment in favor of the City in September 2006. Two years later, the Second Circuit Court of Appeals, which then included Sonia Sotomayor, affirmed the decision. In June 2009, the Supreme Court reversed in a five-to-four decision and held that the City had violated the disparate treatment provision of Title VII by discarding the test results. The Court established a new standard, based upon equal protection case law, that "before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must show a strong basis in evidence to believe it will be subject to disparate

impact liability if it fails to take the race-conscious, discriminatory action." Applying the new standard, the Court's majority argued that the City did not have enough evidence to believe that it would lose a case of disparate impact if it had certified the test results because there was not a strong basis in evidence that the promotional exams were not job-related, consistent with business necessity, or that equally valid, less discriminatory alternatives were available.

Initially designed in Wygant v. Jackson Board of Education (1986) and further developed in Richmond v. J.A. Croson (1989), the strong basis in evidence standard was created to ensure that no state agency could adopt race-conscious policies unless they showed direct evidence—not a generalized assertion—that these measures were narrowly tailored to remedy specific acts of intentional racial discrimination, committed generally if not always by the agency itself. By raising the standard, it became an influential device that the Court has used to limit race-conscious practices. The Court's introduction of the strong basis in evidence standard to disparate impact liability litigation, rather than equal protection remedial cases, marked a radical departure from its legal origins. The statutory domain was a new legal frontier. The standard still was used to determine whether race-conscious measures were justified. However, how a strong basis in evidence applied to a case where the employer feared losing a disparate impact suit that does not involve remedying intentional discrimination was unclear.

The Court has indicated that it adopted the strong basis in evidence standard in Ricci v. DeStefano (2009) to reconcile the differences between the two central principles of Title VII—disparate impact and disparate treatment. This essay argues, however, that the Court failed to achieve its goal. In reality, the standard provides more questions than answers. How does the standard relate to its legal precedents? If the Court is so certain that New Haven's actions in Ricci do not pass this standard, what cases would pass this benchmark? What grounds are necessary for a Court to deem that there is a strong basis in evidence for avoiding disparate impact liability? It is these ambiguities that I will examine

further in this essay. I will also explore the future implications that the Supreme Court's ruling may have on discrimination in the workplace and how Title VII of the 1964 Civil Rights Act will be interpreted.

First, I provide a brief history of how Title VII was developed, and define central terms like disparate impact and disparate treatment that are integral to understanding the Ricci ruling. The second section charts the legal evolution of the strong basis in evidence standard from when the test was first established to its most recent applications to illustrate how the standard has developed over its thirty-year history. Third, I provide a complete background of the facts in Ricci in addition to detailing how the Court's majority introduced the strong basis in evidence standard. I also summarize the dissenting and two concurring opinions.

In the next section, I propose three different readings that the lower courts could potentially have of this new standard. For each reading, I demonstrate the grounds necessary to fulfill the strong basis in evidence threshold and its related practical consequences for both minorities and employers, including whether it effectively reconciles disparate impact with disparate treatment. The final section looks at how district and circuit courts have applied the principles of Ricci in the last year and examines the long-term viability of the strong basis in evidence standard.

II. Title VII and its Principles

Congress enacted Title VII as a provision of the 1964 Civil Rights Act to avoid employers from using employment practices that disadvantage persons on the basis of race, sex, religion, national origin, or sexual orientation unless the practice is job related and consistent with business necessity. Title VII seeks to combat workplace discrimination by providing citizens with the promise of equal employment opportunities. At first, Title VII was meant as a regulation of interstate commerce and applied only to private employers. However, in 1972, the Equal Employment Opportunity Act extended Title VII's coverage

to the public sector in accordance with Congress' authority under Fourteenth Amendment to ensure that "[no] State shall…deny to any person within its jurisdiction the equal protection of the laws."

The Supreme Court's initial application of the clause focused on holding employers liable for engaging in intentional discrimination, or disparate treatment. Such discrimination occurs when one person is intentionally treated differently due to their race, sex, national origin, or other characteristic. Disparate treatment is the type of discrimination with which most people are familiar. The prevailing framework that the Court uses to analyze a case of disparate treatment comes from McDonnell Douglas Corp. v. Green (1973). First, a plaintiff must establish a prima facie case of disparate treatment by showing the plaintiff has been disadvantaged in some concrete way. Second, the burden then falls upon the employer to "articulate some legitimate, non-discriminatory reason" for its actions. Third, the burden then shifts back to the plaintiff who must demonstrate that the employer's defense was "a pretext or discriminatory in its application."

While the 1964 Civil Rights Act explicitly accounts for intentional discrimination, there is no mention of unintentional discrimination, or disparate impact. According to the Supreme Court in International Brotherhood of Teamsters v. United States (1977), disparate impact refers to "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." The Court first expanded Title VII to include unintentional disparate impacts in the landmark employment discrimination case, Griggs v. Duke Power Co (1971).

Griggs v. Duke Power Co. (1971) dealt with an employer who changed the requirements for positions in their labor department, the plant's lowest-paying sector. Applicants were now required to have a high school diploma and receive a passing score on an aptitude test. On the surface, these additional qualifications did not appear discriminatory. However, it became evident that there was an adverse impact when "a

markedly disproportionate number of [African-Americans]" were rendered ineligible. In North Carolina, where the plant was located, "thirty-four percent of white males, but only twelve percent of African-American males, had high school diplomas." Far fewer African-Americans passed the aptitude tests in comparison to whites. The aptitudes measured in the tests, nevertheless, were rarely required to perform the duties of the jobs in the plaintiff's labor department.

In result, the Griggs Court unanimously concluded that the high school diploma and test requirements violated Title VII of the 1964 Civil Rights Act. They argued that Title VII was intended to include "the consequences of employment practices, not simply the motivation." Even if a policy appears to be facially neutral, an employer still assumes the risk that they could be held responsible when an adverse impact exists, if there is no legitimate business justification for the measures producing that impact.

The Court specified a two-step process, much like the McDonnell Douglas framework, for determining whether an employer is liable for disparate impact. First, the plaintiff must demonstrate a prima facie case of unintentional discrimination by illustrating that the disputed employment practice, despite appearing facially neutral on the surface, has a disproportionate impact on a protected group such as, African-Americans or women. Second, the employer then has the burden to prove what the Court calls the "touchstone" of disparate impact liability, that the challenged practice was justified as a "business necessity" and "reasonably related" to the job at hand.

In Albemarle Paper Co v. Moody (1975), the Court further refined the scope of what "business necessity" entailed. The justices stated that when the contended practice is a test, the employer is required to establish the test's validity under specific testing standards that are now laid out by the Equal Employment Opportunity Commission. The burden fell upon the employer to demonstrate that its test fairly and accurately reflected the qualifications of the job. For the next decade, the Griggs and Albemarle precedent had an influential impact on federal and appellate court decisions as the concept of disparate

impact gradually evolved.

Disparate impact faced its first major challenge in Wards Cove Packing Co v. Atonio (1989) when the Court made a drastic shift in its interpretation. The Court significantly lowered the standard for employers so that they no longer had to prove business necessity, just that their hiring practices were reasonably justified. An employment practice would be permissible so long as it "serve[d], in a significant way, the legitimate employment goals of the employer." Moreover, once a prima facie case of disparate impact was established, the burden shifted to the employer to show justification for the disparate impact. The employer's burden is one of production and not persuasion. In other words, the employer only has to produce evidence that is sufficient to show that the criteria used in hiring are objectively related to their employment goals. The burden of persuasion, the task of convincing the Court that the criteria are not part of any bona fide occupational qualification, remains with the plaintiff. This relaxing of standards provided fewer incentives for the employers to ensure that their practices did not violate disparate impact. Following Wards Cove, the Supreme Court continued to diminish the scope and effectiveness of federal civil rights protections and generated considerable protest.

In response, Congress passed the 1991 Civil Rights Act. The bill explicitly codified for the first time the concept of disparate impact as an amendment to Title VII of the Civil Rights Act of 1964. It declared that engaging in disparate impact discrimination was an "unlawful employment practice." Furthermore, the Act revived the "business necessity" and "job-related" requirements that were first laid out in Griggs and Albemarle. Once a prima facie case of disparate impact is established, the burden once again falls upon the employer "to demonstrate that the challenge practice is job related for the position in question and consistent with business necessity." This time, Congress enacted a third, more stringent step. Should the employer successfully meet the burden, the plaintiff then has the opportunity to respond by identifying "an alternative employment practice" which the employer "refused to adopt."

The tension between Title VII's core tenets—disparate impact and disparate treatment—most directly lies in its relationship with the Constitution's Fourteenth Amendment. The Equal Protection Clause is intended to protect equal opportunities and thus, clearly challenges intentional forms of discrimination. However, it does not explicitly prohibit unintentional discrimination. It is this distinction upon which debate has centered for the past thirty-five years.

The seminal differentiation of disparate impact and equal protection occurred in the Washington v. Davis decision (1976). Two African-Americans, whose applications for a police position were rejected, sued the Washington, D.C. police department for using racially discriminatory hiring practices. The Court ruled against them and stated that an official act will not be held "unconstitutional solely because it has a racially discriminatory impact regardless of whether it reflects a racially discriminatory purpose." The plaintiffs needed to show a discriminatory motive, also known as intent. Justice White, writing the majority opinion, went on to clarify that "disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution."

Following Washington v. Davis, the Supreme Court has come to accept that disparate treatment principles apply at the constitutional and statutory levels. The terms disparate treatment and equal protection have become "virtually interchangeable in their conceptual relationship to disparate impact" over time. Disparate impact, though, applies only in the statutory context, unless the Equal Protection Clause is read differently than the Court has decided to do.

The more extreme defenders of the Washington decision assume that efforts to avoid disparate impact are incompatible with equal protection. They read the Equal Protection Clause to prohibit all decisions based on race. Concern for unintentional discrimination, on the other hand, necessarily means adopting polices to avoid or correct unequal racial consequences—decisions that are therefore made on racial grounds. To proponents of

color-blind approaches, the Equal Protection Clause is inconsistent with concern for unintentional discrimination. It forbids only intentional discrimination. Should the Court take this position in the future, avoiding or remedying racially disparate impacts could be deemed unconstitutional under the Fourteenth Amendment, or at least be severely diminished.

However, opponents of the Washington decision argue that the two principles are complementary to one another. They assume that the clause is read to mean that all people should be protected equally under the law by remedying past racial injustices and avoiding actions that needlessly perpetuate or exacerbate racial inequalities. Decisions aimed at such remedies and avoidance necessarily involve race. Under this construction, because the Equal Protection Clause guarantees not only equal opportunities, but just if not necessarily equal outcomes as well, the clause includes both intentional as well as unintentional forms of discrimination. These contrasting interpretations of how disparate impact relates to the Equal Protection Clause create the main point of contention between the majority and the dissent in evaluating the strong basis in evidence standard in Ricci.

III. The Legal Evolution of the Strong Basis in Evidence Standard

Before examining the strong basis in evident standard within the context of Ricci, it is important to examine how the test has been elaborated in legal precedents. The standard has a relatively young history—a mere twenty-five years—in comparison to older tests such as strict scrutiny and rational basis. Strong basis in evidence originates in affirmative actions cases dealing with the Equal Protection Clause of the Fourteenth Amendment.

The test was first introduced in Wygant v. Jackson Board of Education (1986), a case that dealt with increasing the percentage of minority personnel in the school system. Based upon a collective bargaining agreement between the Jackson, Michigan Board of Education and the local teacher's union, a provision was passed to ensure that in the event of layoffs, the percentage of minority personnel laid off would never exceed the current

percentage of minority personnel employed. The school board could also not lay off teachers with the most seniority. The lawsuit occurred when schools in Jackson, Michigan laid off nonminority teachers with seniority, yet retained minority teachers with less seniority. In a five-to-four decision, the Supreme Court ruled that the layoffs violated the Equal Protection Clause, claiming that the public employer's affirmative actions plan failed to meet the requirements of strict scrutiny. In order to satisfy the strict scrutiny test, a law or policy must be justified by a compelling government interest such as national security or equal protection, narrowly tailored to achieve that interest and the least restrictive means for achieving that interest.

The strong basis in evidence standard makes its appearance when Justice Powell, writing the majority opinion for the Court, argues that employers "must have sufficient evidence to justify the conclusion that there has been prior discrimination." A legacy of societal injustice is not a strong enough argument to warrant remedial action because the Court claims it is "too amorphous." More proximate and firm evidence of discrimination by the employer must exist in order to make a remedial action warranted. In result, the Court states that "the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that the remedial action was necessary." A public employer must now fulfill a higher benchmark to use race-conscious remedies.

Following Wygant, the most critical case to flesh out the strong basis in evidence standard is Richmond v. J.A. Croson Co. (1989). In 1983, the City Council of Richmond, VA required companies awarded city construction contracts to subcontract thirty percent of their business to minority business enterprises. When Croson lost its contract because it failed to set aside thirty percent to minorities, the company sued, arguing that Richmond violated the Equal Protection Clause. In Fullilove v. Klutznick (1980), the Court had ruled that Congress had the power to design minority set-aside programs under the Commerce Clause. However, in Richmond, the Court held that states and local governments had less power to do so. Applying strict scrutiny, the City of Richmond's minority set-aside program

was deemed unconstitutional.

The City of Richmond brought forth four key pieces of evidence to justify their remedial actions. First, minorities faced a significant lack of opportunities in the construction industry due to past public and private racial discrimination, making it exceedingly difficult for a minority business to succeed in the Richmond area. A historically small number of minority businesses in the local contracting industry had been awarded contracts (0.67%) despite minorities making up fifty-percent of the city's population . Second, African-Americans had also been excluded from skilled construction trade unions and training programs. Third, the plan was consistent with the recent Fullilove decision. Fourth, a legacy of widespread racial discrimination existed on local, state, and national level in the construction industries. The City of Richmond's enactment of the thirty-percent quota was, therefore, intended to encourage minority entrepreneurship and remedy former discrimination, public as well as private.

In the majority opinion, Justice O'Connor rejects the City's argument. She claims that "a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." It is a slippery slope if one takes into account all past injustices. O'Connor feared that encouraging arguments of this nature would set the standards too low in determining what was sufficient to justify a racial discrimination claim. It would be uncertain as to how far in the past that discrimination could extend, or when something could still be classified as discrimination.

Even though it had supplied four pieces of evidence to support its decision, Richmond had not shown enough proof to provide a strong basis in evidence that the remedial action—the thirty-percent quota in awarding government contracts—was necessary. It lacked "a prima facie case of a constitutional or statutory violation". According to the Court, the fact that there was a legacy of racial discrimination in the construction industry was not a viable argument to justify the thirty-percent quota. A more proximate

cause of discrimination, including significant discrimination by the City itself, was required. O'Connor points to the fact that there was "no evidence that qualified minority contractors had been passed over for city contracts or subcontracts, either as a group or in any individual case."

Richmond v. J.A. Croson Co. (1989) marked the first time that the strong basis in evidence standard was applied to a specific case. The Court did not provide very specific guidance as to how the standard should be used, nor as to how much evidence is sufficient to prove that remedial action is justified. Nevertheless, the Court did establish that a strong basis in evidence standard was more demanding than making a generalized assertion of past racial discrimination.

Since Richmond, the strong basis in evidence standard has been used to evaluate remedies for prior discrimination in circumstances when strict scrutiny is applied. In Shaw v. Hunt (1996), the Court applied the strong basis in evidence standard when determining whether a North Carolina voting reapportionment plan represented an appropriate response to voting inequities, or an intentional act of racial gerrymandering that violated the Equal Protection Clause. The deliberate creation of a majority-minority district in North Carolina was meant to increase African-American representation in the state's political system as well as the likelihood that the state would elect an African-American representative to Congress for the first time since the Reconstruction era. But the Court declared that a compelling state interest did not exist for North Carolina to minimize the consequences of racial bloc voting for African-Americans by consciously creating a district in which they would be a majority. It deemed the reapportionment plan to be unconstitutional.

In order to provide a strong basis in evidence that the state was justified in remedying past discrimination through this district plan, the state of North Carolina relied on passages from two reports written by a historian and a social scientist regarding racial discrimination in the state. This evidence was not sufficient. The state of North Carolina had failed to meet the strong basis in evidence standard because the Court found that "there is little

to suggest that the legislature considered the historical events and social-science data that the reports recount, beyond what individual members may have recalled from personal experience." The Court, therefore, did not accept that the districting plan was consciously, much less precisely, designed to address the racial inequities documents in the reports.

More recently, the Roberts Court used the strong basis in evidence standard to help justify their argument against the constitutionality of remedial programs to promote racial integration in public schools in Parents Involved v. Seattle School District No. 1 (2007). The Seattle School Board did not provide any evidence about remedying past discrimination and instead focused on forward-looking justifications, such as the promise of lessening racial disparities in education. Justice Clarence Thomas' concurring opinion argues that future consequences or simply allegations of a racial imbalance "cannot substitute for specific findings of prior discrimination." He emphasizes the idea of proximate evidence that O'Connor stressed in Richmond. The Seattle school district failed to show a strong basis in evidence that the race-based measure were necessary as remedies for specific acts of discrimination by the district, and it was found in violation of the Fourteenth Amendment.

This benchmark, up until Ricci, had solely been used for constitutional purposes involving the Equal Protection Clause. Strong basis in evidence had been utilized to determine whether a certain action fulfilled a compelling state interest under the strict scrutiny test. The test has been tied to the idea that a state agency adopting race-conscious policies must show direct evidence—not a generalized assertion—that racial measures are narrowly tailored to remedy specific acts of proven racial discrimination, usually if not always discrimination by the state agency itself. Because the test raises the standard for evaluating race-conscious measures, it has been an influential tool that the Supreme Court has used to limit race-conscious decision making over the last three decades.

By applying the standard with the same intent but within a statutory context, Ricci represents a radical departure in legal precedent. It marks the first time that the standard has been applied to disparate impact liability. For both equal protection and disparate impact

cases, the strong basis in evidence standard is intended to determine whether race-conscious measures are justified. However, prior to Ricci, the standard was only used to ensure that there are no racial measures for remedial purposes unless specific evidence of intentional discrimination has been shown; it is unclear what it means when strong basis in evidence is applied to a city that fears losing a disparate impact suit not involving intentional discrimination. The set of criteria that one would have to show must be different, but how? It is this question that Justice Ginsburg posed to the Court's majority, and that I seek to answer later on in this essay.

IV. Case Background

Following an affirming summary judgment from both the district court and the Second Circuit Court of Appeals, the Supreme Court granted certiorari to Ricci v. DeStefano and placed the case on the docket for their 2008-2009 term. On June 29, 2009, they reversed the Second Circuit's ruling in a landmark 5-4 decision. The Court held that the City of New Haven had violated Title VII of the 1964 Civil Rights Act.

Facts of the Case

In 2003, the City of New Haven fire department administered examinations to determine the most qualified candidates to be promoted for lieutenant and captain positions. The examination was comprised of a written component that accounted for sixty percent of the final score, and an oral section that was worth forty percent. This formula was agreed upon in a contract between the City and the local firefighters' union.

The City hired Industrial/Organizational Solutions, Inc. (IOS), a company that specialized in designing promotional exams for fire and police departments. They were responsible for developing, testing, and administering the examinations. In designing the test, the company identified the key characteristics, knowledge, and skills necessary to fulfill

the lieutenant and captain positions. They interviewed current lieutenants and captains and asked them to complete a questionnaire as part of their research. When testing the validity of the examination, IOS deliberately oversampled minority firefighters to protect against unintentionally favoring white candidates.

Following the administration of the examination, the New Haven Civil Service Board was required to certify the results. They then used a system called the "rule of three" where a single candidate is chosen from the top three scorers on the ranked list in order to choose who is actually promoted. Since these promotional lists remain active for two years and therefore are infrequent, the stakes for taking this examination were quite high.

A total of 118 New Haven firefighters took the examinations in November and December 2003. For the lieutenant examination, there were seventy-seven candidates—43 whites, 19 blacks, and 15 Hispanics. Only thirty-four candidates passed—25 whites, 6 blacks, and 3 Hispanics. Using the rule of three, the eight vacant lieutenant positions would be filled by the top ten candidates. All ten were white. For the captain examination, there were forty-one candidates—25 whites, 8 blacks, and 8 Hispanics. Only twenty-two candidates passed—16 whites, 3 blacks, and 3 Hispanics. Using the rule of three, the seven vacant captain positions would be filled by the top nine candidates. This included seven whites and two Hispanics.

Given the test results, the City feared that the examinations unintentionally discriminated against minority candidates. The City's director of human relations noted how a statistically significant racial disparity existed on both exams. Under Title VII of the 1964 Civil Rights Act as amended by the Civil Rights Act of 1991, an employer might be held liable for violating disparate impact, defined as "policies or practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities."

The Civil Service Board first met in January 2004 to discuss certifying the test results. Over the course of five meetings, they heard testimony from firefighters and expert witnesses who supported certifying the test as well as those who opposed its certification.

An industrial-organizational psychologist criticized the weighting formula as arbitrary and advocated the use of performance assessment centers to measure the most qualified candidates more accurately. Others, like Frank Ricci, a dyslexic New Haven firefighter who took the exam, argued that test questions accurately measured the requirements to fulfill the position. The representative from the IOS stated that "in [his] professional opinion, [the examinations were] facially neutral. There's nothing in those examinations…that should cause somebody to think that one group would perform differently than another group." After the fifth meeting, the CSB voted to not certify the test results.

The Civil Service Board's decision to not certify the test results is the proximate cause of what prompted the lawsuit. The plaintiffs—seventeen white firefighters and one Hispanic who passed the examinations but were denied a chance to be promoted on the basis of their exam results—filed suit against the City of New Haven for violating Title VII of the 1964 Civil Rights Act and the Equal Protection Clause of the Fourteenth Amendment. They contended that the City had engaged in an act of intentional discrimination against whites when the CSB refused to certify the test results.

Both parties filed for summary judgment. The district court awarded summary judgment in favor of the City. They concluded that under Title VII, the respondents' "motivation to avoid making promotions based on a test with a racially disparate impact… does not, as a matter of law, constitute discriminatory intent." As for the Equal Protection claim, the district court claimed that the City did not act "based on race" since "all applicants took the same test, and the result was the same for all because the test results were discarded and nobody was promoted." The Second Circuit affirmed the decision of the district court, adopting the previous court's reasoning.

The Supreme Court's Majority Opinion

Justice Kennedy wrote the majority opinion. He claims that the City of New Haven made an explicitly race-based decision when they decided to discard the test results,

and it therefore violated the prohibition against disparate treatment under Title VII absent some "valid" defense. Kennedy argues that "the City rejected the test results solely because the higher scoring candidates were white." Rather than examining further whether the City's behavior was intentionally discriminatory within the meaning of the law, Kennedy chooses to focus on the question of "whether the purpose to avoid disparate impact liability excuses what otherwise would be prohibited disparate treatment discrimination." In doing so, he attempts to reconcile what he believes are two conflicting principles, as well as to provide lower courts with guidance.

Kennedy rejects both the plaintiff and the defendant's claims in the case. He criticizes the plaintiff's argument that posits "avoiding unintentional discrimination cannot justify intentional discrimination" as being "overly simplistic and too restrictive of Title VII's purpose," given that Congress had added prohibitions of certain disparate impacts in the 1991 Civil Rights Act as an amendment to Title VII. The defendants, along with the US Government, contend that "an employer's good-faith belief that its actions are necessary to comply with Title VII's disparate impact provision should be enough to justify" that the City should not be held liable for disparate treatment because it discarded the exams. In doing so, the Court instead adopts a new test—the "strong basis in evidence" standard—for when employers may use race conscious means to prevent disparate impacts. The majority rules that it is permissible for an employer to use the avoidance of disparate impact liability as a defense when engaging in intentional discrimination if and only if there is a "strong basis in evidence to believe it will be subject to disparate impact liability if it fails to take the race-conscious, discriminatory action."

According to Kennedy, introducing this standard into Title VII litigation allows courts to reconcile the tension between disparate impact and disparate treatment by accepting "violations of one in the name of compliance with the other only in certain, narrow circumstances." He further states that "the standard leaves ample room for employers' voluntary compliance efforts" while at the same time it "appropriately constrains employers'

discretion in making race-based decisions." Employers should not have to concede actual violations, just have strong basis in evidence that they will be held liable for disparate impact.

Kennedy then applies this new standard to the present case and rules that the City has failed to show with a strong basis in evidence that discarding the test results would pose serious risks of being held liable for disparate impact. An employer can no longer administer an exam and then choose to disregard it based upon an adverse racial impact when there is evidence that the exam is job-related, consistent with business necessity, and equally valid, less discriminatory alternatives do not exist. The Court stresses that the strong basis in evidence standard only applies after the selection process is underway. To avoid disparate impact liability, it is crucial that an exam's validity is evaluated before an exam is administered.

As we should see, in light of the evidence on New Haven's conduct, the majority implicitly appears to reject the possibility that failure to search for alternative exams that might be equally effective, job-related, and more racially inclusive would provide a strong basis in evidence of liability to lose a disparate impact case. A selection procedure must be narrowly tailored to predict how a candidate would perform the duties of a particular position, as mentioned in Ricci. The opinion does not note, however that a selection procedure could be done that includes finding an exam that both measures appropriate qualifications well and is as racially inclusive as possible. By not mentioning a search for racially inclusive tests as a component in demonstrating a strong basis in evidence of a disparate impact claim, Kennedy discounts its importance and subsequently ratchets down what an employer needs to show to avoid disparate impact liability. Even if a test produces racially skewed results, employers did not have to pay attention to racial inclusiveness in the first place, because it was not one of the requirements that Kennedy set forth to prove that they had reason to fear disparate impact liability. Only under a sympathetic reading of the standard would racial inclusiveness be considered a requirement.

Since the City did not show that it had a strong basis in evidence to fear loss of

a Title VII disparate impact lawsuit in the Court's eyes, the majority refused to make any ruling on the constitutional claims. The plaintiffs were awarded summary judgment. The case was reversed and remanded.

Scalia's Concurrence

Justice Scalia filed a concurring opinion where he predicted that this ruling "merely postpones the evil day that the Court will have to confront the question: Whether, or to what extent, are the disparate impact provisions of Title VII of the Civil Rights Act of 1964 [as amended in the Civil Rights Act of 1991] consistent with the Constitution's guarantee of equal protection?" The tension lies in the fact that the Equal Protection Clause and disparate treatment provisions of Title VII, according to Scalia, presuppose that judgments based upon race are prohibited, while disparate impact explicitly assumes race-conscious decision-making. He is suggesting that disparate impact, as amended to Title VII in 1991, will eventually be held unconstitutional under his reading of the Equal Protection Clause.

Alito's Concurrence

Justice Alito filed a concurring opinion as well. In it, he claims that two questions must be decided when evaluating whether an employment practice is legitimate: first, an objective question of "whether the reason given by the employer is one that is legitimate under Title VII;" and second, a subjective question of the employer's intent. Alito argues that because the City did not have a legitimate reason not to certify the results of its original tests, it is not necessary to examine their intent in refusing to do so. He disagrees with the majority in how they interpret the first question. Alito makes the case that the City chose to discard the test for illegitimate political reasons, as an effort to please African-American constituents. He chronicles how an important African-American leader exerted strong political pressure, using his personal ties with the New Haven mayor to push the CSB to vote against certifying the test results. Given these motives for suspending its test, not any

discovery of its inefficacy, Alito believes that a reasonable jury would not have found the City liable for disparate impact. His argument, therefore, does presume to know the City's intent, even though he says otherwise in the opinion.

Ginsburg's Dissent

Justice Ginsburg, siding with the respondents and the US Government, maintains that the City of New Haven had "good cause that it would be vulnerable to a Title VII disparate impact suit if it relied on those results." She criticizes the majority for adopting the new strong basis in evidence standard and for not considering that there was "substantial evidence of multiple flaws in the test." She also defends the rulings made by the district court and Second Circuit by emphasizing that their actions were "race-neutral." Therefore, Ginsburg anticipates that "the Court's order…will not have staying power."

Ginsburg recounts how there has been a history of racial discrimination in municipal employment including New Haven. Even though African-Americans and Hispanics composed thirty percent of the New Haven population in the 1970s, they made up fewer than four percent of the City's firefighters. In 2003, with the racial composition of New Haven unchanged, African-Americans and Hispanics remained only sixteen percent of the City's firefighters. In upper level positions, the racial disparities were even greater.

She suggests that Title VII was set forth to advance two complementary goals: "ending workplace discrimination and promoting genuinely equal opportunity." However, Ginsburg feels that the majority's ruling has placed these two objectives at odds with one another. She advocates a reading of disparate impact and disparate treatment that are complementary, not conflicting as the majority sees them. She understands her "good cause" standard as significantly less demanding than what the Court appears to require, but still significant.

Ginsburg concentrates her dissent on attacking the strong basis in evidence standard that the majority has implemented. She contends that the Court finds documented failings

on the part of the City insufficient to show vulnerability to a disparate impact lawsuit but does not adequately explain why. The dissent faults the Court for "denying respondents any chance to satisfy the newly announced strong basis in evidence standard." It is ordinary protocol to allow the Court to devise a new principle, but permit the lower courts to interpret its meaning and then litigate to demonstrate whether the lower courts have indeed interpreted it correctly.

Finally, Ginsburg responds to Alito's concurring opinion. She dismisses his argument, claiming that there is "scant evidence that [the CSB's] motivation was anything other than to comply with Title VII's disparate impact provision." Ginsburg demonstrates how the board heard from both sides, and that there is little evidence to believe that political maneuvering of any kind took place. She concludes by emphasizing that "New Haven might well have avoided [this unfortunate situation] had it utilized a better selection process in the first place."

V. The Three Readings of the Strong-Basis-In-Evidence Standard

It is at best uncertain how the lower courts will interpret "strong basis in evidence" now that the Court has applied it to the statutory domain. For starters, the strong basis in evidence standard is surely a more rigorous standard than the good-faith standard that the dissent advocates. Employers can no longer just reasonably believe that they will be held liable for disparate impact. Instead, they now must demonstrate a strong likelihood that a court will rule against them in a disparate impact case. The new standard, therefore, asks employers to fulfill a much more demanding criterion.

Nevertheless, the way in which the Court has adopted strong basis in evidence appears to have provided more questions than answers in seeking to reconcile disparate impact and disparate treatment. It is not clear how the standard's legal precedents make it relevant to this case. If the Court is so certain that Ricci does not pass this standard, what

cases would actually pass this benchmark? What grounds are necessary for a Court to deem that there is a strong basis in evidence? Justice Ginsburg frames this uncertainty as a central part of her dissent.

I propose three different readings that the lower courts could potentially have of this standard and question whether each reading effectively reconciles disparate impact with disparate treatment. The first construction of the strong basis in evidence benchmark would effectively equate a disparate impact violation with a disparate treatment violation, as Ginsburg suggests the majority was doing. Under this demanding interpretation, evidence of negligence alone is insufficient to prove disparate impact liability. As a result, an employer must prove to a court that, had they used the desired examination, they would probably have lost an intentional discrimination, disparate treatment case—not just a disparate impact case—if a suit was brought. Employers would essentially be required to show an actual constitutional violation against themselves. In this reading, the Court aspires to make it as difficult for the employer as possible to promote race conscious practices. If lower courts choose to apply this reading, then the disparate impact provisions of Title VII will be severely undermined at the expense of disparate treatment, significantly limiting the authority and duty of governments and other employers to avoid policies with disparate impacts that unintentionally increase racial inequalities.

A second approach that lower courts could take to the strong basis in evidence standard would be a more expansive one. Uncertain as how to apply the standard to disparate impact liability, lower courts may be left with the dissent's good-faith argument as a reasonable equivalent. An employer's legitimate belief that it would be held liable for disparate impact would in practice be treated as sufficient to fulfill the strong basis in evidence requirement. Lower courts might find this reading to be an appealing way to minimize the Court's recent condemnation of race-conscious measures. This interpretation would allow the City of New Haven to be justified in discarding the test results and thus, be awarded summary judgment. The "good-faith" reading would be a victory for advocates of

diversity in the workplace—but it would involve effectively ignoring the majority decision of the Supreme Court in Ricci.

Neither of the two readings is one that the Ricci majority would recognize as its strong basis in evidence standard, yet they are possibilities because just what the Court attempts to establish in this case is unclear. Because of this uncertainty, I contend that the third reading that the lower courts may take is one where they simply do not know what to do with the strong basis in evidence standard because its meaning is too ambiguous. According to this construction, the Supreme Court failed to provide sufficient guidance on what criteria are necessary to pass the test and thus, lower courts will be unable to make any valid conclusions. The standard, under this reading, fails to achieve what it sets out to accomplish: reconciling the tension between disparate impact and disparate treatment. Lower court judges cannot even apply the rule because they do not understand what has specifically been resolved. Rather than adopting and thereby enforcing the Court's standard, they will choose to avoid it until the Court offers further criteria to help delineate what constitutes a viable strong basis in evidence argument.

The Most Demanding Reading of the Strong Basis in Evidence Standard

In the majority opinion, Kennedy states that an employer must demonstrate a strong basis in evidence that it would lose a case for disparate impact if it did not take further acts on racial grounds. This can be achieved through a three-step process laid out by the 1991 Civil Rights Act. First, the employer must show a prima facie case of disparate impact. Second, they must demonstrate that the exam used was not job-related or consistent with business necessity. And third, the employer must show that it had equally valid, less discriminatory alternatives available to them.

a) The Equal Employment Opportunity Commission Guidelines

In making these showings, employers are not without established guidelines,

but the majority opinion in Ricci appears to call these guides into question. In 1978, the federal Equal Employment Opportunity Commission laid out specific guidelines to assist employers in designing nondiscriminatory exams, called the Uniform Guidelines of Employee Selection Procedure. These guidelines primarily concern the issue of validity, which answers the question of whether a test is actually measuring what it is supposed to be measuring. Chief Justice Burger held in Griggs v. Duke Power (1971) that the EEOC standards were entitled to "great deference." Following Albemarle Paper Co. v. Moody (1975), courts have been required to evaluate employers' tests against these professional standards. Judges often preferred that validity testing be conducted through an outside company so that there is no apparent bias in the measurements. The EEOC guidelines identify three ways that employers can demonstrate that their examinations fulfill the "business justification" standard set forth in landmark Griggs decision. All three methods emphasize the importance of a systematic statistical analysis to prove that an exam is adequately reflecting the qualifications for a particular position.

The first and most common method that employers can use to evaluate their test's validity is criterion validation, which looks at the strength of the relationship between test scores and levels of job performance through statistical analysis. One type of criterion validation, known as predictive validation, involves administering a test to applicants but then not using the results in the hiring decision. Later on, an employer can match the performance of those employees hired with their tests results to determine whether the test accurately predicted job performance. A much easier approach, known as concurrent validation, is to give tests to current employees and correlate their tests scores with their job performance.

Content validation, a second method, measures whether the technical knowledge and skill set that are integral to the job are accurately reflected in the content of the exam. It is most often used to determine the validity of achievement tests, which assesses how well a candidate has mastered a particular area or subject. In order to persuade a court of

content validation, an employer must demonstrate that it undertook a rigorous job analysis to understand the specific qualifications that a candidate must possess to succeed in the position, and then applied that analysis directly in writing the content of the exam.

The third and most complex validation method is construct validation, often used for aptitude tests. This technique evaluates whether a test correctly assesses, not achieved knowledge or skills, but rather behaviors and traits that are important to job performance. Since many of the constructs tested, like the capacity to lead and ability to work with others, are fairly subjective or intangible, construct validation often poses a much greater challenge for employers to prove. An employer must conduct an even more rigorous job analysis than in the content validation method to determine the desirable work behaviors and attributes of successful job performance.

b) The Flaws in the New Haven Promotional Exams

In the Ricci dissent, Ginsburg uses this framework to conclude that the test that New Haven used had a "selection process [that] was flawed and not justified by business necessity." . There are several reasons that she contends that the tests used were problematic. The test failed to fulfill any of the three methods of exam validity laid out in the EEOC's Uniform Guidelines. Ginsburg focuses her criticism of the New Haven promotional exams on the contention that heavy reliance "on written tests to select fire officers is a questionable practice." First, the City of New Haven failed to conduct any validation study when the IOS designed the captain and lieutenant examinations. Second, she questions why there was no discussion of whether the decades-old agreement that exams should be weighted 60/40 for the written and oral section accurately determined the most qualified candidates or why no alternatives to the formula were ever explored. Even if the City had only used written and oral components, the exam would have better reflected an applicant's qualifications by weighting the oral sections greater than the written component. An oral exam shows that an applicant can apply the knowledge to real-life scenarios, a skill that is vital to being a

successful firefighter, more so than a written exam. A lawsuit following Ricci deals directly with the weighting formula issue, which I will discuss later.

Third, if the City had exercised due diligence, then it would or should have known that the use of assessment centers represented a "more reliable and less discriminatory" alternative that was available at the time it used the IOS tests. She points out that an expert witness in Ricci advocated for the use of assessment centers, where real-life situations could be simulated, because they better reflected the traits necessary for the position than a candidate's responses on a written or an oral exam. A 1996 study found that two-thirds of surveyed municipalities have moved away from paper-and-pencil exams to using real-life simulations to address better how a candidate would perform in a real-world situation. The fact that the City of New Haven neglected even to search for others forms of testing was therefore a significant oversight that contributed to why their exams were so severely flawed. Had the City of New Haven conducted more thorough job analyses and ensured the exam's validity, they could have easily avoided years of costly litigation. The neglect of available alternatives provided further good cause to believe that the City might be held liable.

Fourth, the IOS failed to seek input from the New Haven Fire Department concerning the exam before it was administered to ensure that it reflected the necessary characteristics and knowledge of the positions. Looking at the evidence that Ginsburg lays out in the aggregate, it is clear that the City did not follow the EEOC guidelines, as required under Albermarle, and its promotional exams were not clearly shown to be job-related and consistent with business necessity. Therefore, the City had good cause to think that they would have been held liable for disparate impact had they not discarded the test results.

c) Kennedy Discounts The Exams' Flaws

However, as noted in the Ricci majority opinion, Kennedy contends that the promotional exams were sufficient in meeting the business justification requirements, even

though they did not evaluate the validity of their exams very thoroughly. According to Kennedy, using a good-faith defense has a slippery slope and would be read too expansively to be a desirable standard. It could potentially "amount to a de facto quota system." Kennedy fears that this defense would encourage race-based decisions like racial balancing. In result, the Court's majority rejects the claim that the City had a strong basis in evidence to believe they would be held liable for a disparate impact suit, even though the City of New Haven had demonstrated that passage rates of non-whites on the exams fell well below the eighty percent satisfactory standard that the Equal Employment Opportunity Commission has set forth to implement disparate impact, and despite testimony indicating the flaws of the test and New Haven's test selection process.

First, Kennedy claims that "there was no genuine dispute that the examinations were job-related and consistent with business necessity," without alluding to rigorous statistical validation studies as required by the EEOC statndards. The IOS gave testimony to the New Haven Civil Service Board about "details steps" to develop and administer the exams. Moreover, the IOS conducted "painstaking analysis" of the positions to ensure that the test accurately reflected the job qualifications of the positions. The IOS had made sure that minorities were overrepresented when they were testing the exams. The New Haven Civil Service Board also approved the source material from which the IOS designed the exams. Kennedy also points that the IOS had detailed information prepared to prove the exam's validity, but the City did not take the IOS up on its offer.

Second, he contends that the City "lacked a strong basis in evidence of an equally valid, less discriminatory testing alternative." The City did not provide sufficient evidence to prove that changing the composite-score calculation, for instance from 60/40 for the written and oral examinations to 30/70, would be an equally valid method to find the most qualified candidates. In fact, Kennedy argues that modifying the weighting formula in favor of a racial balance or adopting a different interpretation of the "rule of three" after the fact would have violated disparate treatment under Title VII, just as much as refusing to certify

the test results.

He also dismisses the use of practical assessment centers as viable options, arguing that they too lacked enough justification to be a viable alternative.

By asserting that the City of New Haven did not have a strong basis in evidence to avoid disparate impact liability, Kennedy accepts that tests that create unintentional, unequal racial consequences are often permissible. Employers may well be justified in using tests that have disparate impacts and do not follow the EEOC guidelines for exam validity. Kennedy largely ignores the facts that Ginsburg mentions in the dissent about the exam's flaws.

Most importantly, he does not clearly delineate what the sufficient threshold is for an employer to believe that it would be held liable for disparate impact. If the City did their due diligence and did enough to show that their exams were justified without having to ensure the validity of their exams comprehensively, then Kennedy might be implying that the only alternative left to meet the strong basis in evidence standard is to show that the City's actions were intentional racial discrimination in the first place. Vulnerability to disparate impact lawsuits would then be equivalent to vulnerability to disparate treatment lawsuits, effectively eliminating the 1991 disparate impact provisions added to Title VII of the 1964 Civil Rights Act.

d) The Most Demanding Reading

The most demanding reading of the strong basis in evidence standard would then be that the City of New Haven must show that had it certified the initial examinations instead of discarding them, the City would have probably been held liable for violating disparate treatment. The City would need to demonstrate a strong basis in evidence that the initial test would cause it to lose a case accusing it of intentionally discriminating against a certain group. Since Kennedy rejects proof of negligence as an adequate means of showing a strong basis in evidence, then an employer is left with nothing else but proving intent.

A reading such as this would be closely aligned to the way strong basis in evidence has been read previously in strict scrutiny cases. As I mentioned earlier, the standard was initially designed to ensure that state agencies implementing race-conscious practices were narrowly tailored to remedy specific acts of intentional racial discrimination. It essentially made it more difficult for agencies to employ legitimate race-conscious measures. A demanding construction of the strong basis in evidence standard might, therefore, be seen as an extension of the standard's original goal to cases of disparate impact.

There appear to be two potential ways that the City of New Haven might have passed the strong basis in evidence standard using this restrictive reading of Kennedy's opinion—but both amount to showing intentional discrimination, not just the negligence that creates disparate impact liability. First, the City could have consciously decided not to use less discriminatory alternatives like assessment centers, even though using less discriminatory alternatives would have decreased the adverse racial impact and provided a more equitable employment opportunity. The City could have shown evidence that it knew assessment centers were equally valid, less discriminatory alternatives to the current examinations and even though that it had this knowledge, it willingly ignored these facts so that it could produce a result that favored white firefighters. Had the City shown it adopted policies no more valid than those it rejected, and ones that it knew would create a racial imbalance, it would have succeeded in achieving the strong basis in evidence standard using this framework.

Another way the City could have met Kennedy's apparent criteria was by showing that the City purposely chose not to revise the two-decades-old contract with the firefighters union, which laid out that the 60/40 weighting formula for the written and oral portions of the exam, even knowing alternatives existed that would not disadvantage minority firefighters. Despite the fact that City was aware that a neighboring city, Bridgeport, had changed its formula so that the oral component was given primacy over the written component because it better "addressed the sort of real-life scenarios fire officers encounter

on the job," and Bridgeport now had minorities that were fairly represented in its exam results, the City of New Haven did not emulate Bridgeport. It might therefore have been expressing a preference for white firefighters to remain overrepresented in its upper level positions. By setting out the parameters early on with the IOS, the IOS could not explore other equally valid, less discriminatory alternatives to the 60/40 weighting formula or more importantly, whether or not that weighting formula best reflected the qualifications for the job.

While it would be possible to pass the strong basis in evidence threshold in these ways, I would predict that most, if not all, cases would fail to meet this reading of strong basis in evidence. Cities may well be reluctant to provide evidence that actually incriminates them. It is paradoxical, verging on absurd, to impose a standard that essentially asks employers to show a high probability that a disparate treatment case can be successfully brought against them. They would not only be forced to produce evidence that casts their agencies in a pejorative light, but also willingly tarnish their own reputation.

It is unclear as to what type of physical evidence is necessary today to demonstrate that the City had intended to discriminate. I have provided some examples above, but these are simply conjectures. We no longer live in a world where explicit racism is an accepted cultural norm. Written documentation that clearly enumerates that an employer has a specific racial preference is much harder to come by today than seventy or eighty years ago. Discovering an employer's intent is often speculative at best.

e) Consequences of the Most Demanding Reading

Although it may be too soon to tell how race-conscious measures will actually be affected by the implementation of the strong basis in evidence standard, the most demanding construction would almost certainly have a negative effect, should the lower courts adopt that position. If the main objective of Title VII is to one day live in a world where workplace discrimination no longer exists, then the most demanding reading of

the strong basis in evidence standard runs counter to that aim. It increases the bar that employers must fulfill to show they had a legitimate belief that they would have been held liable for disparate impact, and it legally permits employment tests with unintended adverse racial impacts. In result, the new standard threatens to invalidate the long-accepted EEOC guidelines as well as opens the door to more tests with disparate impacts.

i. The Potential Invalidation of the EEOC Guidelines

By arguing that the City's exams were sufficient, Kennedy appears to show that an exam can be job related and consistent with business necessity without having to comply with the testing guidelines. If so, it would be a shocking break from precedent. Ricci could have potentially invalidated, or at least severely diminished, the importance of these forty-year-old EEOC guidelines.

Employers would no longer have any incentive to spend money on validation studies. They could also be insulated from disparate-impact suits. Future tests that have substantial disparate impacts and are not statistically proven to be job related could potentially be viewed as acceptable in the eyes of the Ricci Court. Without any guidelines for employers to use, it would be much harder for employers to prove that they will lose a disparate impact suit. There would no longer be a generally accepted method for employers to adopt to ensure that they have avoided disparate impact liability. Instead, they would be at the whims of the court to decide which evidence is sufficient to demonstrate a strong basis in evidence of unintentional discrimination. Disregarding the EEOC guidelines would therefore threaten employers' efforts to encourage diversity as well as allow tests with unintended racial consequences to persist.

The viability of the EEOC guidelines as a source to demonstrate a strong basis in evidence remains an unanswered question. How the Court responds to similar litigation in the future could very well shift the way employers and lawyers regard the EEOC guidelines in measuring test validity. While I do recognize that Kennedy may be hinting at invalidating the EEOC guidelines, the most recent literature on the strong basis in evidence standard

for both cases of disparate impact and equal protection have emphasized the importance of statistical analysis. Legal scholars have focused on using the three types of validity, as laid out by the EEOC, to prepare employers should they face a suit resembling Ricci.

ii. Opens the Door to More Tests with Disparate Impacts

The promise of promoting diversity in the workplace is to correct for a legacy of discrimination and changes the cultural norms to accept these minorities as equals. However, the Court's imposition of the strong basis in evidence standard in Ricci threatens the success of this goal. By allowing for more tests with unintended, unequal racial impacts to exist, employers do not have to do their due diligence and can be less cautious about the exams that they use without fearing a disparate impact suit. It also raises the bar that employers must fulfill in order to demonstrate disparate impact liability, making it more difficult for an employer to show that they would lose. In result, employers are likely to be more hesitant in discarding examination results, or similar means, to remedy disparate impacts.

Unless the Ricci opinion radically alters the lower courts' belief in these ways, the likelihood remains that if the City had certified the test results, it might well have lost a disparate impact suit for having an adverse racial impact. Ricci already makes clear that by not certifying the test results, the City violated disparate treatment. In light of these situations, employers are not left with the "ample room for voluntary compliance" as Kennedy believes it does and undermines the promotion of equal employment opportunities. The new standard significantly lessens the authority and duty of governments to avoid policies with disparate impacts.

Most frustratingly, by permitting more tests with disparate impacts, the Court's new standard does not resolve the tension between disparate impact and disparate treatment that Kennedy seeks to achieve. On the contrary, it diminishes disparate impact, making it a much weaker protection than disparate treatment, and places their two goals at odds with one another, when both principles together are critical to fighting discrimination in the workplace. Therefore, in its most rigorous reading, the strong basis in evidence standard

does not effectively reconcile disparate impact and disparate treatment. Instead, the standard unjustly imbalances the two principles and discourages employers from making more race-conscious decisions in the workplace.

The "Good-Faith" Reading of the Strong Basis in Evidence Standard

The Court's introduction of the strong basis in evidence standard to statutory provisions was a radical shift in the way the standard was originally understood. Since Kennedy fails to spell out precisely how an employer can prove with a strong basis in evidence that they would lose a case of disparate impact, lower courts could be left with little more than the dissent's good-faith reasoning as the minimal requirement to fulfill the standard. In this reading of strong basis in evidence, lower courts may adopt the good-faith argument as a reasonable equivalent.

The strong basis in evidence benchmark could then be fulfilled so long as an employer demonstrate that it has a legitimate belief—a reasonable basis to fear—that it would have been held liable for disparate impact. It would be sufficient proof to show a "reasonable basis" of disparate impact liability to constitute a "strong basis in evidence." Applying this interpretation, Ricci would satisfy the strong basis in evidence standard because the City of New Haven had good cause to believe that a court would have found the City guilty of violating disparate impact.

The City could establish a reasonable basis by showing more than just a mere statistical disparity. It would also have to show a good cause to believe that it would not meet the "business necessity" requirement and thus, had reason to in fear disparate impact liability. As I have already shown, Ginsburg's dissent contends that the examinations themselves had several deficiencies and were of questionable character. The weighting formula that the City used was antiquated, and the City neglected the use of available alternatives such as assessment centers, which were "more reliable and less discriminatory in operation," and so forth. Taken together, the City had good cause to believe that they

could not fulfill the "business necessity" requirement and would be held liable for disparate impact if the nonwhite firefighters brought suit. The City would fulfill the strong basis in evidence standard and therefore, would have been justified in discarding the test results.

This looser strong basis in evidence standard is akin to a paradigm used in equal protection cases called the rational basis test. It is the default standard of review, and the lowest level of scrutiny. The rational basis test determines whether a governmental action was a reasonable means—not arbitrary—to achieving an end. Furthermore, the action must be rationally related to furthering a legitimate government interest. Many of the terms used to describe the rational basis test are analogous to the dissent's good-faith argument. At its core, a "good-faith" reading of the strong basis in evidence standard is merely a question of reasonableness. Just as the narrowest reading might be a statutory proxy for a strict scrutiny test, it appears the same is true for an expansive reading and a rational basis test.

The relaxed reading of the strong basis in evidence standard provides a more concrete answer as to what can and cannot pass the threshold than the more demanding construction. By framing the standard in this manner, there is greater flexibility about what can meet this test, so this standard is more feasible for employers to achieve. An employer is not required to incriminate itself in order to achieve the standard, nor to have to worry about what constituted intent. Although it still lays the burden of proof on the employer, the benchmark is not nearly set as high as the more demanding construction.

Consequences of the "Good-Faith" Reading

Should the lower courts adopt the "good-faith" reading of the strong basis in evidence standard, employers would not have the lose-lose situation that they would experience under the more demanding reading. Employers could more freely shift to inclusive race-conscious measures without the fear of reverse discrimination lawsuits so long as they could demonstrate a legitimate good cause to fear a disparate impact liability. The EEOC guidelines would remain intact. More importantly, on a practical as well as a symbolic level, incentives would still exist for employers to promote diversity in the

workplace. Employers would not be restricted in making race-conscious decisions, as they would be under the most demanding reading of the standard.

Although lower courts would be effectively ignoring the Ricci majority opinion by embracing this reading, they would be able to reconcile the tension between disparate impact and disparate treatment. By lessening the amount of scrutiny to prove disparate impact liability, employers would be allowed to be more inclusive in the types of candidates that they choose to hire. Employers could successfully satisfy the two complementary pillars of Title VII that Ginsburg discusses in her dissent: "ending workplace discrimination and promoting genuinely equal opportunity." The good-faith test, aligning itself with the expansive view of disparate impact embodied in the 1991 amendments to the 1964 Civil Rights Act, recognizes that both principles—disparate impact and disparate treatment—are vital complementary components to eradicating discrimination at the workplace.

Yet, it is important to note that disparate treatment remains the stronger provision because it is explicitly protected under the Fourteenth Amendment, where disparate impact is not, at least as the Court has interpreted the Equal Protection Clause. There are two ways to strengthen disparate impact so that it is perceived as fully equal to disparate treatment. Judges could reinterpret the Equal Protection Clause expansively to include disparate impact. Or, a more challenging option would be to amend the Constitution to enumerate disparate impact as a provision of the Fourteenth Amendment. These possibilities will be explored further when discussing the future of the strong basis in evidence standard.

The Ambiguous Reading of the Strong Basis in Evidence Standard

The final interpretation that lower courts may have to Ricci's strong basis in evidence benchmark is one based upon uncertainty. The legal evolution of the strong basis in evidence standard, as well as Ricci itself, fails to provide specific guidance about what

criteria are necessary to fulfill the standard or how it should even be applied. Without a good understanding of what strong basis in evidence entails, judges will have difficulty being able to apply the standard. Therefore, lower courts could potentially read the strong basis in evidence standard as being too vague to have any legitimate legal meaning.

Besides confirming that the strong basis in evidence is a higher threshold than the dissent's good-faith argument, the Court does not fully flesh out what is meant by instituting a more rigorous standard. It is unknown what cases would actually meet the strong basis in evidence standard. The Court does not enumerate a specific step-by-step approach, like the McDonnell-Douglas burden-shifting framework for disparate treatment and the related Griggs test for disparate impact, as to how an employer can successfully reach the strong basis in evidence threshold.

Instead, the majority makes broad, descriptive claims such as the standard "leaves ample room for employers' voluntary compliance efforts" and "constrains employers discretion in making race-based decisions" without detailing any specific criteria. If no explicit steps exist to pass the standard, it then begs the question of why the Court is so certain that Ricci does not meet the strong basis in evidence standard. It is foolish to think that a judge can make a ruling applying the strong basis in evidence standard when no criteria exist for how to meet its threshold.

Kennedy failed to offer reasonable evidence as to why they believed that the strong basis in evidence standard could make the jump from Equal Protection cases dealing with absolute racial preferences to a disparate impact case in a statutory context. He assumes that the "tension between eliminating segregation and discrimination" are the same as "the interplay between the disparate impact and disparate treatment provisions of Title VII," but this connection is grossly oversimplified for the reasons that Ginsburg confronts. Since the Court's application of strong basis in evidence in Ricci is such an unwarranted departure from the standard's legal evolution, it is unlikely that lower court judges will be able to use the standard effectively for disparate impact cases.

Consequences of the Ambiguous Reading

If this line of reasoning holds true in application, then employers too will be unsure whether they should encourage race-conscious practices with the risk that they may or may not be held liable or should they just hedge their bets. They will also sit in a holding pattern in the interim. The applicability of the EEOC guidelines will also remain in flux if lower courts resist ruling on the strong basis in evidence standard. The one consequence that is for certain should lower courts adopt an ambiguous reading is that discriminatory employment practices will persist. Tests with disparate impacts will go unchallenged and will continue to flourish. This effect, much like in the most demanding reading, undermine the aims of Title VII and reduce its importance.

Therefore, the ambiguous reading of the strong basis in evidence standard most clearly represents the critical failure of the standard itself. Strong basis in evidence is designed, first and foremost, to reconcile the tension between disparate impact and disparate treatment. Yet, if lower court judges do not even have a strong grasp of how to apply the standard appropriately, then the tension will persist and hotly contested issues will remain unresolved. Until the Court provides further clarity regarding what constitutes a passable strong basis in evidence, I suspect that a majority of lower courts will hold off on adopting the Court's standard and thereby will exacerbate further discrimination in the workplace.

VI. The Future of the Strong-Basis-in-Evidence Standard

Because it has only been a year since the Ricci decision was released, it may be too soon to draw any conclusions regarding which reading the lower courts will take on the strong basis in evidence standard. Nevertheless, there have been a few instances of legal activity within the past year that have sought to apply the principles of Ricci and provide

further clarification on enumerating what is necessary to fulfill the strong basis in evidence threshold. A great cloud of ambiguity still remains over how the standard works, but courts have now tried to apply the Court's reasoning. For now, the lower court's rulings seem to suggest two different directions for evaluating the standard—ones that follow the spirit of Ricci and ones that try to limit its potential influence. In this section, I will examine how recent court decisions on the district and circuit level have interpreted Ricci, as well as what the potential long-term implications of the strong basis in evidence standard may be.

Recent Court Decisions

a) US and the Vulcan Society v. The City of New York (2009-2010)

Less than a month after the Supreme Court issued the Ricci ruling, a federal court in New York held that the New York City Fire Department's written entrance examinations unintentionally discriminated against African-American and Hispanic applicants and thus, violated Title VII of the 1964 Civil Rights Act. Of the approximately 3,1000 African-American applicants and 4,200 Hispanic applications who sat for the test, the City only hired 184 African-American firefighters and 461 Hispanic firefighters. The City's selection process prevented roughly a thousand African-American and Hispanic candidates from joining the firefighter department. The Eastern District concluded that the City's promotional tests had a statistically significant racial disparity between whites and nonwhites, and the tests did not establish that it was job-related or consistent with business necessity.

However, Judge Nicholas G. Garaufis was quick to point out that the Ricci does not directly apply to this case. Where the Ricci Court ruled that New Haven would likely have not been liable for disparate impact, the City of New York feared an actual disparate impact suit. Judge Garaufis does believe that Ricci's discussion of the importance of validity testing is relevant. Even though the Supreme Court may have potentially invalidated the EEOC guidelines with Ricci, Garaufis makes a strong effort to reinforce the importance of these guidelines by explicitly applying them. He declares in his opinion that "municipalities

must take adequate measures to ensure that their civil service examinations reliably test the relevant knowledge, skills and abilities that will determine which applicants will best perform their specific duties."

He criticizes the City of New York for taking even fewer steps than the City of New Haven had in validating their tests. Garaufis then uses the criteria that the EEOC has laid out to thoroughly detail how the City of New York's examinations were poorly constructed. He points out several flaws in the tests, such as how they failed to demonstrate that the reading level was appropriate. They did not test for the important abilities of a firefighter. The City also failed to prove that the exams administered actually tested the abilities they intended to test. The City had imposed arbitrary pass/fail scores that were unrelated to the qualifications for the job.

Five months later, the federal district court declared that the City of New York's firefighters examinations had not only unintentionally discriminated, but also intentionally discriminated against minority candidates and therefore violated the disparate treatment provisions of Title VII and the Equal Protection Clause. Judge Garaufis writes that it was not a "one-time mistake or the product of benign neglect. It was part of a pattern, practice, and policy of intentional discrimination against black applicants that has deep historical antecedents and uniquely disabling effects." He criticizes the City for failing to do its due diligence in devising tests that were nondiscriminatory in nature and argues that there was a strong basis in evidence that the City knew its exams were discriminatory, yet failed to take sufficient remedial action.

What was significant in this ruling was that Garaufis determined that the City intentionally discriminated using only the statistics about the number of minority applicants hired compared to the percentages in the applicant pool and the city's population, along with evidence of failure to fulfill due diligence as defined by the EEOC guidelines. There was no other evidence of any explicit discriminatory statement to establish intent. This decision to focus only on the numbers and decision-making processes as constituting "intent" might

signal a shift away from the courts' past reliance on clear, smoking-gun statements of intent.

Moreover, the district court's ruling has insulated the City from a reverse discrimination claim should the City choose to revise their firefighter exams as Judge Garaufis ordered, because they have been provided with the strong basis in evidence that the tests were discriminatory. Strong basis in evidence allows them to have a legitimate built-in defense to prove why remedial action was necessary. Although this case found Ricci not to be controlling, the Eastern District of New York seems to indicate that employers still need to illustrate that their examinations have undergone rigorous statistical analysis and are in fact valid. Judge Garaufis was so emphatic about stressing the EEOC guidelines to establish the validity of the examinations that it suggests that there might be some resistance should the Court decide to invalidate the EEOC guidelines. The City of New York case, therefore, indicates that lower courts are willing to go against the principles laid out in Ricci and openly reject the de-emphasis of EEOC guidelines compliance that Kennedy appears to have advocated in the majority opinion.

b) NAACP v. North Hudson Regional Fire & Rescue (2010)

NAACP v. North Hudson Regional concerns a disparate impact challenge to a consolidated municipal fire department whose residency requirements for hiring had, allegedly, a disparate impact against African-American applicants. Eliminating the residency requirements was intended to achieve a more desirable racial distribution of candidates for hiring. In February 2009, the New Jersey district court concluded that the Regional department did unintentionally discriminate. They granted the NAACP's motion for a preliminary injunction and refused to allow the Regional to hire new candidates until it expanded its residency requirements. However, in light of the Ricci decision that came after the February 2009 decision, the US Court of Appeals for the Third Circuit remanded the case back to the district to reconsider the preliminary injunction applying the principles from Ricci to its factual and legal analysis.

On April 23, 2010, Judge Debevoise for the New Jersey District Court lifted

the ban against hiring firefighters and argued that "the residency requirements in this case furthers legitimate business goals in a significant way" in accordance with the Ricci decision. He began his opinion with a full discussion of Ricci and how it relates to the current case. When the plaintiffs cited US v. The City of New York (2009) to defend their position, Debevoise denied its applicability and stated his disagreement with the Eastern District's ruling. He acknowledged that the plaintiff's claims are factually different from Ricci, but believed that Ricci must still play a factor "because the [present] case implicates the tension between disparate impact and disparate treatment." Debevoise contended that Ricci should be used any time there is a conflict between these two principles, as the Court's majority decision suggests. He took full license in adapting the standard to reflect his own views. According to the district court's ruling, "the strong basis in evidence standard applies whether, in order to cure alleged discriminatory impact, the challenged action is initiated by the employer, such as the NHRFR, or whether the employer is ordered by a court to take a challenge action."

Applying Ricci, the district court must determine whether a strong basis in evidence existed to discard the residency requirements, the remedial action at hand, in order to avoid violating the disparate impact provisions of Title VII. Debevoise explicitly notes that the Supreme Court failed to provide detailed guidance in determining how the strong basis in evidence standard should be applied. He reformulates the Ricci standard to mean "whether the plaintiff's have established a strong basis in evidence that they are likely to succeed on the merits of their disparate impact case." The court finds quite clearly that statistical evidence exists showing a racial disparity, establishing a prima facie case of disparate impact. Only two of 323 employees of the NHRFR are African-American. Looking at proportions comparing the number of African-Americans employed in state and local government jobs in each county, it was indisputable that African-Americans were significantly underrepresented in the NHRFR's work force and was likely attributed to the use of residency requirements.

The burden now shifts to the NHRFR to prove that the residency requirements have a valid business necessity defense, as laid out in Ricci. The NHRFR argue that the residency requirements were necessary for three reasons: first, to avoid a risk of suit by a groups of Hispanics; second, to follow the rules of a previous settlement where the NHRFR agreed to reach and attract additional qualified applicants of Hispanic/Latino origin; and third, to correct past allegations of discrimination and a historic under-representation of Hispanics in the NHRFR. Expanding the residency requirement would, in effect, contradict the principles underlying this previous settlement, which was intended to increase the number of qualified Hispanic applicants. The fear of diluting the accomplishments of this settlement agreement provides the NHRFR with a business justification for resisting the expansion of its residency requirements. The Court also finds that "averting future liability to other groups of Hispanics is another substantial business justification, since the expense of additional litigation could cost the NHRFR significant sums of money."

NHRFR also provides two additional reasons for why there is a business justification for residency requirements. First, because these municipalities have a large Hispanic population, it is vital that Hispanics are well represented in the NHRFR's workforce so that "the NHRFR's protective services workers can better communicate with the [Spanish-speaking] population that they serve." Second, because residency requirements increase the probability that a firefighter will live in the community, it will ensure that more firefighters will be able to report to work more quickly in the case of an emergency. These justifications taken together, according to Debevoise, indicate that the NAACP is not likely to succeed on the merits of their claims and therefore, have not established with a strong basis in evidence that discarding the residency requirements avoided disparate impact liability.

NAACP v. North Hudson marks the first time that the strong basis in evidence standard has been applied to a hiring practice outside a civil service test. What makes the case so interesting is how the introduction of the strong basis in evidence standard has forced two minorities groups—both of whom wish to increase their representation and have the

opportunity to equal employment—to be pitted against one another. Where the Hispanics have used the standard to their advantage, the African-Americans in the community now must live with the residency requirements that quite clearly have a disparate impact.

An alternative that Judge Garaufis fails to look at is one that accommodates for Hispanics while still restricting the use of residency requirements. In this instance, the regional fire department can still actively attract Hispanic applicants within the specified municipalities that the previous lawsuit pertains to and at the same time make it more accessible for African-American candidates to apply as well. A plan such as this would have improved equal opportunities for both minority groups.

The case illustrates that applying strong basis in evidence to efforts to avert disparate impact liability does not comply with the goals of Title VII. Rather, it allows discriminatory employment practices to continue and compels judges to choose between which minority group is more "justified" in having race-conscious practices. NAACP v. North Hudson is thus consistent with the principles set forth in Ricci and suggests that lower courts are willing to adopt the high court's new standard.

c) Briscoe v. New Haven (2010)

In the aftermath of the Supreme Court's Ricci decision, litigation has continued over the contested New Haven exams. Michael Briscoe, an African-American firefighter who took the promotional test in 2003, filed suit after the Court's ruling, claiming that the 60/40 weighting formula for the written over the oral component had a disparate impact on African-American candidates. Briscoe belatedly discovered that he was the top scorer on the oral section of the exam for the lieutenant position, yet scored only twenty-fourth overall due to his lower score on the written portion and would not be among the group that was eligible for promotion.

In April 2010, Connecticut's federal district court dismissed Briscoe's claims in accordance with the Supreme Court's ruling in Ricci. Even though Briscoe argues that

it is unfair to apply Ricci to his case, Judge Charles S. Haight, Jr. states that the Supreme Court specifically "foreclosed subsequent disparate impact suits, such as Briscoe's, against the City based on the 2003 exam" by introducing the strong basis in evidence standard and then applying it to Ricci. He mentions that had the Ricci majority adopted the dissent's approach of remanding the case in light of the strong basis in evidence standard, then Briscoe could have intervened to raise his claims over the weighting formula. But since the Supreme Court did not remand the case, Briscoe "cannot circumvent that decision by filing another lawsuit with respect to the same exams." Judge Haight reaffirms the Supreme Court's decision that there was not a strong basis in evidence that the City of New Haven would lose a disparate impact suit had they certified the tests, and thus rules to dismiss the case.

Briscoe v. New Haven is another instance of the lower courts following the spirit of Ricci. Since the district court was tightly constricted by the decision of the higher court, the ruling is not particularly surprising and does not reveal anything particularly novel about using the strong basis in evidence standard. Although, had Judge Haight ruled in favor of Briscoe, then there would have been an interesting divide between the district court and the Supreme Court on applying the standard. This case does bring closure to the extensive litigation over the City of New Haven's 2003 promotional exams.

d) Further Cases Remanded in light of Ricci

Like the NAACP v. North Hudson case, several other cases have been remanded in order to reconsider the ruling now that Supreme Court has ruled on Ricci and introduced the strong basis in evidence standard. On the same day as the Supreme Court issued the Ricci decision, the Court also vacated judgment and remanded a similar case back to the lower court, Oakley v. Memphis (2009). The case concerns the Memphis Police Department who decided to cancel its promotional exam because too few minority candidates score well enough to be promoted and thus, Memphis wanted to avoid disparate impact liability. Just as in Ricci, the plaintiffs brought suit alleging that the Memphis Police Department

intentionally discriminated against them by using race as the basis for canceling the valid promotional process. The Sixth Circuit Court of Appeals affirmed the district court's dismissal of the plaintiff's complaint on the grounds that the City's desire to avoid a potential lawsuit was a legitimate nondiscriminatory intent. Now that the Supreme Court has remanded, the Sixth Circuit Court of Appeals will have to reconsider their decision applying the principles of Ricci to its factual and legal analysis as the New Jersey district did in NAACP. Nearly a year later, they have yet to release a new decision.

The Second Circuit Court of Appeals also released a decision in April 2010 remanding a case, Bridgeport Guardians, Inc. v. Delmonte (2010), to the lower court to reconsider given the Ricci decision. Bridgeport deals with an interim modification order set in place so that the Bridgeport Police Department could adopt race-conscious promotional and hiring practices, and reduce tests with disparate impacts. The plaintiffs argue that the order violates Title VII and the Fourteenth Amendment. Because the Supreme Court issued Ricci after the order was appealed, the district court could not review the merits of the order using the strong basis in evidence standard from Ricci. The Circuit Court declined to exercise its discretionary power and remanded the case to the district level to reconsider the order in light of the Ricci decision.

Over the next year, I would expect many higher courts to follow suit and remand cases to apply the principles from Ricci. The spotlight on the development of the strong basis in evidence standard now turns to the lower courts. I suspect that judges will examine the disparate impact doctrine with further scrutiny, but the ways in which it will be applied, I predict, will vastly differ. Since it is so early in the post-Ricci litigation period, judges will likely want to leave their mark in shaping the standard as seen in the cases that I have discussed. Judge Debevoise disagreed with the US v. City of New York ruling and raised his concerns explicitly in the NAACP v. North Hudson opinion. I believe that we will continue to see a heated discussion amongst judges in how to understand the new standard until the Supreme Court clarifies its meaning.

The Long-Term Viability of the Strong Basis in Evidence Standard

Strong basis in evidence has already had an effect on recent court decisions. But, will the standard only have a short-term effect or will it have more far-reaching implications? I argue that it has the potential to do both. The standard itself may have a brief shelf life, but its long-term influence could dramatically change the way the disparate impact doctrine is perceived. Examining the constitutionality of disparate impact helps to resolve this discrepancy.

Although the Court chooses not to confront the constitutional issue over disparate impact, the Ricci decision is rooted in these constitutional concerns and "reaches further than its reasoning would suggest." The Court imports the strong basis in evidence standard from equal protection case law, but does not clearly flesh out whether disparate impact should conform to equal protection norms or whether the doctrine actually violates the Equal Protection Clause. The primary divergence between the majority and the dissent rests on how disparate impact should be read. The majority's ruling is consistent with the prevailing trends that the Court has taken over the past two decades towards restricting the doctrine's influence. On the other hand, Ginsburg's dissent reflects the expansive view of disparate impact as set forth in the 1991 amendments to the 1964 Civil Rights Act in an effort to combat Wards Cove.

Ginsburg predicts in the dissent that the strong basis in evidence standard of liability to lose a disparate impact suit "will not have staying power." I believe that with due time, she will be correct. The standard will be invalidated through one of two possible trajectories. Should the Court experience an unexpected ideological shift in the near future toward more liberal-minded justices, the Court will likely overturn Ricci and nullify the standard. They will embrace a more expansive conception of disparate impact that is viewed as complementary to the Equal Protection Clause, and in result, employers will have a greater incentive to promote voluntary compliance efforts. While this option is viable

possibility, its success will depend on the timing of vacancies on the Court.

Assuming that the Court's ideological composition will remain the same, the more likely path for the strong basis in evidence standard is for the Court to continue building upon the Ricci precedent. The new standard provides a foundation so that the Court can support more radical change over disparate impact in the future by further narrowing the doctrine's scope to fit the majority's interpretation of the Equal Protection Clause. Should the Court read the Equal Protection Clause to prohibit race-conscious decision-making, then disparate impact, which implicitly assumes such practices, is in inherent conflict. As Justice Scalia suggests in the concurrent opinion, the Court is likely to deem Title VII's disparate impact provision as unconstitutional with the Equal Protection Clause, or at least severely limit the provision.

Overturning disparate impact would be an aggressive act for the Court to take, but an unsurprising one given its recent ideological trajectory. Decisions like Parents Involved v. Seattle School District 1 (2007) and Gratz v. Bollinger (2003) show a Court that is eager to thwart affirmative action policies. The Ricci ruling also reveals a Court that is willing to set aside established precedent, namely Griggs and Albermarle, and apply a new standard from a different area of the law in order to reformulate the way disparate impact is used. Clearly, the Court has signaled with Ricci that they have more work to do interpreting disparate impact. It appears that they may have purposely crafted Ricci as a skipping stone to eventually ruling disparate impact as unconstitutional. Thus, it is reasonable to conclude that regardless of the Court's ideological makeup, the strong basis in evidence standard is likely to be an impermanent standard.

Another Congressional Fix?

Now that the Court has weakened disparate impact by introducing the strong basis in evidence standard, it seems as though the fate of disparate impact, at least in the short-term, has again fallen into the hands of the legislature. Congress came to the rescue

and officially codified disparate impact as an amendment to the 1964 Civil Rights Act in 1991 after Wards Cove significantly undercut the doctrine two years prior. Today, with comfortable Democratic majorities in both houses of Congress and a Democratic President, it would seem that conditions would be more favorable to strengthen disparate impact than in 1991. In fact, the 2009 Lilly Ledbetter Fair Pay Act, the first bill that Congress enacted when Obama became President and dealt with the statue of limitations for filing an equal-pay lawsuit regarding pay discrimination, was intended to directly counteract a 2007 Supreme Court decision. That said, the issues and principles in Ricci is a far more complicated and politically-charged than the simple rule overturned by the Ledbetter Fair Pay Act. While the majority of the 111th Congressional session has dealt with resolving the recent financial crisis and reforming health care, it is hopeful that the 112th session, following this year's mid-term elections, will tackle the Ricci decision and bolster disparate impact yet again.

If Congress does enact legislation that strengthens the disparate impact doctrine, then I do hope that the Supreme Court will respect this legislation and choose not to hear a case that challenges it. Nevertheless, action from Congress may just be the smoking gun that provokes the Court, as Scalia contended, to address head on the constitutional question of "whether, or to what extent, are the disparate impact provisions of Title VII… consistent with the Constitutions' guarantee of equal protection?" Since the Court seems to indicate that disparate impact is unconstitutional in Ricci, it is possible that Congress may be doing more harm than good in the long-term by enacting legislation if the Court chooses to actively pursue this issue.

Should a Congressional attempt to restore disparate impact back to its original 1991 definition fail, only two other options remain, and neither has strong prospects. The easier alterative of the two would be to have a radical change in the ideological composition of the Supreme Court to make way for justices who could reinterpret the Equal Protection Clause to include disparate impact. Unless one of the conservative-leaning justices surprisingly

dies or retires in the very near future, this path does not seem promising. The justices who are most likely to retire from the Court are liberal leaning and Obama's appointments, as a Democrat himself, are not expected to change the ideological composition of the Court.

The more challenging option would be to amend the Constitution to enumerate disparate impact as a provision of the Fourteenth Amendment. In order to do so, the amendment would have to face the extremely difficult burden of either being approved by three-fourths of the state legislatures or ratifying conventions in three-fourths of the states, as per Article V of the Constitution. While this alternative would be the best defense for protecting against conservative efforts to limit to right to prohibit unintentional forms of discrimination, I do not anticipate that an amendment codifying the disparate impact doctrine would generate the necessary political support and media coverage to be successfully enacted as an amendment to the Constitution. Therefore, while I would encourage Congress to take action on the issue, it is likely that the power in developing the strong basis in evidence standard will lie with the courts.

VII. Conclusion

After a six-year legal struggle, the thirteen white firefighters and one Hispanic firefighter who sued after the City of New Haven had thrown out the test results were officially promoted to either lieutenant or captain on December 10, 2009. Now that the dust has settled on Ricci, what can employers and judges alike take away from the case? In short, Ricci has made matters much more complicated. It is uncertain what evidence is sufficient for an employer to demonstrate a strong basis in evidence standard that they would lose a disparate impact suit, and judges are left with little guidance to determine what classifies as appropriate in fulfilling the standard and what does not. Furthermore, if the Court was so certain that the City of New Haven's examinations were job-related and consistent with business necessity even though they did not follow the EEOC guidelines, they seem to suggest that employers can willingly ignore the EEOC guidelines. But, they

fail to fully elaborate on the issue, puzzling both employers and judges.

I expect that further judicial wrangling from the district level up to the Supreme Court itself will persist in hopes of resolving the questions that the Court created when they implemented the strong basis in evidence standard to disparate impact. The Court's majority intended to apply the standard to reconcile disparate impact and disparate treatment, two seemingly conflicting principles of Title VII according to Kennedy, for once and for all. I do not think the Court achieved this goal. In actuality, the Court diminishes the disparate impact doctrine at the expense of disparate treatment by allowing tests with unintended racial consequences. They have locked in discriminatory employment practices and made voluntary compliance efforts with Title VII significantly more difficult.

I look forward to a time in the near future when the strong basis in evidence standard is overturned and disparate impact reverts back to its initial construction either due to a change in the Court's ideological composition or from Congressional action. Employers should have an incentive to promote diversity in the workplace. Citizens should have a right to prohibit measures that unintentionally discriminate against minorities. The Supreme Court's newly established precedent threatens this right. I fear that the Ricci decision is just the beginning of further limitations of the disparate impact provisions of Title VII that will lead up to the frightful day when the Court holds disparate impact as unconstitutional with the Equal Protection Clause. Hopefully, the nation will never encounter such a crippling setback in affirmative action efforts, and policies to promote diversity in the workplace will flourish.